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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-____

SEDCO INTERNATIONAL, S.A., SEDCO, INC., and SEDCO ENERGY CORPORATION (formerly TerraMar Consultants, Inc.),

Petitioners,

v.

WILLIAM F. CORY and MARCELLA MCKILLIP, Executors of the Estate of Roy J. Carver, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Are standards of due process and fundamental fairness satisfied in a federal court trial when a claimant is allowed to invoke a claim of attorney-client privilege to prevent discovery and to avoid being cross-examined at trial, thereby leaving untested the truthfulness of his central claim that he allegedly relied upon misrepresentations of the defendant in lieu of the advice contemporaneously given to him by his own lawyers?

2. Whether our federal court system will knowingly allow itself to be used by a litigant to recoup losses the litigant directly incurred to further operations of a business enterprise he acquired through bribery which corruptly influenced a foreign governmental official?

LIST OF ALL PARTIES

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[1] As required by Supreme Court Rule 28.1, a list of the parent companies and subsidiaries of the Sedco companies is set forth in Appendix G. This list is placed in the appendix because of its length.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Lay, Stephenson, McMillian) is reported at 683 F.2d 1201 (8th Cir. 1982) and is set forth in the Appendix beginning at page A-1. The opinion of the District Court (Hanson) is reported at 522 F.Supp. 254 (S.D. Iowa 1981) and is contained in the Appendix beginning at page B-1. The District Court's

opinion, although lengthy, addresses only one of the two issues raised in this Petition. (Appendix C)[2]

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1982. Petitioners filed a timely Petition for Rehearing on August 16, 1982 which was denied on August 27, 1982. (Appendix D) This Petition is filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

RULES AND STATUTORY PROVISIONS

The texts of the Fifth Amendment to the United States Constitution (due process clause); Federal Rules of Evidence 103 and 611; and Section 104 of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1981) are set forth in Appendix F.

STATEMENT OF THE CASE

ATTORNEY-CLIENT PRIVILEGE

Roy J. Carver (Carver), an Iowa industrialist, claimed that substantial losses he incurred upon forfeiting a Middle Eastern oil concession were all caused by his alleged reliance upon earlier misrepresentations of Sedco. Sedco International, S.A., Sedco, Inc., and Sedco Energy Corporation (collectively Sedco) are affiliated international oil service companies which (a) chartered offshore oil drilling rigs and well re-entry equipment and (b) provided geo-

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[2] The District Court's opinion addresses the illegality of the Respondents' business bribe, but does not address the issue as to the unfairness of the trial, through the Respondents' abuse of the attorney-client privilege. The District Court did, however, enter an order, without written opinion, which restricted pre-trial discovery on the attorney-client issue. (Appendix C-2, ¶2)

logical and technical petroleum engineering advisory services. Carver was a principal in a Middle-Eastern oil drilling venture which he operated offshore Qatar, one of the United Arab Emirate States on the Persian Gulf. Carver directed and operated the venture through Holcar Oil Company, a corporation which he controlled.

Upon paying a $1,500,000 bribe to influence a Qatar government official, Carver, through Holcar, had obtained offshore oil concession rights from the Qatar government. Under the terms of the grant of the concession rights, Holcar and the Qatar government were to share the revenue from the oil production. Holcar employed Sedco to provide technical petroleum engineering advisory services, a rig, and well re-entry equipment. Sedco was one of several independent contractors so employed. Only about 20% of Carver's investment was spent for Sedco's services. Sedco never had any equity in the venture or any share of the venture's potential profits.

Financed entirely by a series of loans Carver made to the Holcar venture at various times over its two year life (1976 and 1977), the venture began operations; expended substantial sums; but then halted operations upon Carver's orders, without ever producing or selling any of the oil. Substantial sums were expended for on-site operations which were begun, halted, and then never brought to fruition. Substantial sums were paid to others to purchase extremely expensive offshore production equipment which was never used. The Qatar government then terminated the concession in January, 1978 because of the venture's failure to produce the oil — a failure which was a direct breach of the revenue sharing agreement between the venture and the Qatar government. The forfeiture was finally ordered after Carver caused a full year of complete inactivity, during which none of the work re-

quired by his commitment to the government was accomplished, and no oil was produced.

Sedco initially filed this suit to collect the unpaid balance of the account owed to it for the use of its equipment. In a non-jury trial, Carver counterclaimed for damages. The District Court awarded Carver more than $13,000,000 — the full amount of his entire series of loans, less the amount of his bribe.[3] The award was made upon reasoning that:

a. Before the events leading to the forfeiture, Sedco had given false advisory technical data to Carver; therefore

b. Sedco became liable to repay Carver following two years of intervening business decisions which led to the loss of Holcar's only asset — the concession — rendering Carver's loans uncollectable.

The difficulty with this conclusion is that Carver's trial strategy succeeded in preventing any inquiry into the ongoing advice Carver received from three actively involved sets of attorneys, given to Carver during and after the times he claims to have relied upon Sedco. The courts below allowed Carver to claim an attorney-client privilege — preventing determination of the accuracy of Carver's claim that his loss was realized by alleged reliance upon Sedco. Carver's claim of attorney-client privilege, which the District Court enforced, prevented Sedco from (a) obtaining discovery, and (b) cross-examining Carver at trial upon the pivotal issue in the case — Carver's self-serving claim that reliance upon Sedco caused his loss. Carver's intervening series of business decisions, which were made both (a) at the time of the alleged misrepresentations and (b) thereafter, continued through the time Carver for-

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[3] With pre- and post-judgment interest, the award totaled more than $17,000,000 when rendered. (Appendix E)

feited the concession. These decisions were made by Carver with the advice of his lawyers. The courts below, nevertheless, purport to decide the case even though the advice Carver actually acted upon has never come to light. Carver's self-serving testimony upon this issue has never been tested by cross-examination. Sedco has been held liable even though:

a. Carver received contemporaneous business and legal advice from three actively involved sets of attorneys over the course of the venture.

b. Carver admittedly consulted with his lawyers "many times" regarding (a) his business decisions; (b) his analysis of the value of the concession property; (c) his decision to suspend operations; (d) the events leading to Carver's failure to minimize any potential loss by timely selling his interest to others to avoid the forfeiture; and (e) the events which caused his entire forfeiture of the concession, causing his loss.

c. It is undisputed that Carver had the financial ability to see the venture through, but instead, with the suppressed advice of lawyers, risked losing and did in fact lose the concession through forfeiture. This is the event which made his loans to the venture uncollectable — for which Sedco has been held fully liable.

d. It is undisputed, through Carver's express admission, that Carver did not rely upon Sedco for any advice of any kind for the entire year (1977) which preceded his forfeiture of the concession.

Sedco sought pre-trial discovery because Carver, by choosing to place his claim of reliance in issue, waived any privilege to suppress the facts needed to determine

his claim. The District Court refused to allow discovery upon this issue.[4]

During the trial the District Court adhered to this ruling, and firmly refused to allow Sedco to cross-examine Carver about the substance of the advice Carver had when he claims to have relied upon Sedco, and upon the advice Carver later acted upon in finally bringing his loss to fruition. Nevertheless, in decisions made without knowledge of the advice Carver actually acted upon, the District Court and the Court of Appeals find Sedco liable based upon Carver's untested assertions.

BRIBERY

Carver paid a $1,500,000 bribe to the Swiss bank account of Kassem Jaidah, the brother and business partner of Ali Jaidah, director of Qatar's Department of Petroleum Affairs. This corrupt payment was knowingly made to influence the Qatar government's award of the oil concession to Holcar.

Carver's corrupt conduct did not end with this payment. When later faced with imminent forfeiture of the concession, Carver again proposed bribery — this time to keep the concession. In a meeting with Qatar government officials in the presence of United States Ambassador Kilgore, Carver admitted his first bribe, expressed frus-

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[4] During pre-trial depositions, Carver blocked discovery of the advice from his lawyers by refusing to answer such questions. Before discovery was closed, Sedco moved to compel discovery upon this issue. Instead of permitting discovery, the District Court, after considering the matter for almost one month during which both sides submitted written briefs, entered a written order (Appendix C-2, ¶2) restricting discovery by confining it to the limited information mechanically relayed by Carver's lawyers from "independent sources." Carver purported to comply fully with this restrictive order by disclosing none of the advice of his attorneys.

tration that his entire investment might soon be lost, and stated his desire to bribe again. The United States Department of Justice prosecuted a civil injunction suit to enjoin Carver from making any further offers to induce corrupt conduct of foreign officials. Carver pled *nolo contendre* and consented to the injunction.

THE COURT OF APPEALS' OPINION

ATTORNEY-CLIENT PRIVILEGE

The Court of Appeals' opinion gives but limited recognition to the overwhelming weight of authority which condemns the fundamental unfairness with which the trial in this case was conducted. The essence of Carver's case is a claim of loss causation — dependent upon Carver's asserted claim of reliance upon Sedco. By placing his own reliance claim in issue, Carver has waived any right to suppress the facts relevant to his own information and actual source of reliance.[5]

Having chosen to make his reliance an issue, Carver's attempt to claim an attorney-client privilege to suppress the facts relevant to his own knowledge and reliance is

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[5] The Court of Appeals' opinion recognizes the controlling Iowa test for a finding of reliance in Carver's misrepresentation case: "Whether the complaining party, in view of his own information and intelligence, had a right to rely on the representations." Lockard v. Carson, 287 N.W.2d 871, 878 (Iowa 1980). (Appendix A-10)

At other places, however, the opinion of the Court of Appeals analyzes loss causation from the standpoint of a burden upon Sedco to demonstrate that Carver failed to make reasonable efforts to mitigate his loss. A mitigation analysis, of course, becomes operative only if Carver, as the claimant, is first found to have discharged his burden of proving a prima facie case of loss causation by proving that claimed reliance upon Sedco caused his loss. In either event, the reasonableness of Carver's acts, in allegedly relying upon Sedco in the first instance, or in failing to take subsequent steps to mitigate any loss, depend upon the actual knowledge and advice upon which Carver acted.

improper. The Court of Appeals departs from the universal condemnation of this abuse of the attorney-client privilege. Other courts recognize and describe this abuse as "a procedural trap play that would block the development of the plain truth;"[6] and as a "manifestly unfair" "tool for concealment," the use of which would "pervert" the essential purpose of the attorney-client privilege;[7] and hold the privilege to have been waived to avoid a "vast and unfair litigation advantage"[8] which results in "uneven justice."[9]

Despite the fact that it is logically impossible, and fundamentally unfair to decide the case as tried, the Court of Appeals purports to base its decision upon Carver's untested assertions of reliance upon Sedco, which it uses to conclude that "Carver presented persuasive evidence that he acted in reliance on Sedco employees' statements." (Appendix A-9)

To the extent the Court of Appeals recognizes any waiver of the attorney-client privilege, the Court applies a narrow view of the scope of the waiver which condones the deprivation of Sedco's rights to discovery and cross-examination. The Court of Appeals was firmly unwilling to recognize the critical importance of the right to examine the actual advice Carver, in fact, acted upon.

The opinion focuses upon Carver's claim of earlier misrepresentations, a time frame before most of Carver's investment was made. The opinion does not address the fact that there is a glaring gap of information about the subsequent advice and counsel which Carver acted upon in

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[6] United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc), cert. denied, 403 U.S. 933 (1971).

[7] Hearn v. Rhay, 68 F.R.D. 574, 582 (E.D. Wash. 1975).

[8] Anderson v. Nixon, 444 F.Supp. 1195, 1200 (D.D.C. 1978).

[9] Independent Productions Corp. v. Loew's, Inc., 22 F.R.D. 226 (S.D.N.Y. 1958).

making his intervening business decisions which brought his loss to fruition. These subsequent events encompass Carver's failure to produce any of the oil, his breach of obligations to the Qatar government for a full year, and complete forfeiture of the concession — leaving nothing of Carver's investment to be recouped. Instead of addressing this issue, the opinion professes an inability to "perceive how receipt of ordinary legal advice could have made reliance unreasonable." (Appendix A-10) This analysis ignores both common experience and judicial recognition that, in a misrepresentation claim, legal advice and the claimant's knowledge may serve "as the superseding cause which breaks the damage causation chain running to the defendants." *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1051 (7th Cir.), *cert. denied sub nom. Meers v. Sundstrand Corp.*, 434 U.S. 875 (1977).[10]

Finally, the Court of Appeals purports to excuse the denial of cross-examination upon the ground that "[d]istrict courts possess broad discretion in making evidentiary rulings." (Appendix A-11) However, the opinion does not

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[10]Applied to the facts of this case, the actual advice Carver acted upon directly bears upon the questions:

(1) Whether Carver did or did not rely upon Sedco in making any of his loans;

(2) Whether Carver made a "good faith" effort to secure another partner and obtain approval for the new partnership from the Qatar government. The opinion of the Court of Appeals, Appendix A-17, notes that the district court found Carver made such an effort. However, there is no way to assess Carver's good faith without knowing the advice he was acting upon;

(3) Whether Carver heeded or ignored the advice he had;

(4) Whether the lawyers' advice to Carver was competent or incompetent;

(5) Whether or not any of Sedco's advice was a substantial or insubstantial factor in bringing any loss to fruition;

(6) Whether the advice from Carver's lawyers was a superseding cause in making any investment decision or bringing any loss to fruition.

articulate any discretionary basis for the denial of cross-examination when, as here:

(1) Reliance is a central rather than a collateral issue. Reliance is a fundamental linchpin of Carver's basic cause of action. The erroneous exclusion of cross-examination deprived Sedco of a "substantial right." Fed.R.Evid. 103(a).

(2) No alternative sources of proof were available. Inherent in the secrecy of the attorney-client privilege is the fact that only Carver and his lawyers know the advice Carver actually acted upon.[11]

(3) The believability of Carver's self-serving testimony went untested. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

BRIBERY

The Court of Appeals' opinion affirms the District Court's denial of Carver's claim for recovery of the $1,500,000 corrupt payment to influence the award of the oil concession. However, both lower courts lent their aid to Carver to recover the remainder of the money he invested to further his illegally obtained venture.

Both lower courts were of the view that Sedco, which neither received nor paid any of the bribe money, should, nevertheless, repay the remainder of the money Carver spent attempting to profit from his illegally obtained enterprise. Neither the District Court nor the Court of Appeals found that Sedco made or received any illegal pay-

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[11] "[W]hen erroneously excluded evidence would have been the only or primary evidence ... in opposition to a claim or defense, the error is generally found prejudicial." 1 Weinstein's Evidence ¶103[06] p. 103-61 (1982).

ment. Instead, Carver is permitted to use the courts, in spite of his proven illegal conduct, on the supposed equities of a general finding that "Sedco repeatedly defrauded Carver through several years of the project's life." (Appendix A-18) Neither court below explains how this aspect of their holdings can be reconciled with the serious national policy, codified in statutes such as the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1981). (Appendix F-4) Neither court below addresses the obvious inequity of allowing a briber, who has corruptly violated national public policy, to recover from another who is merely found to have committed a private civil misrepresentation.

REASONS FOR GRANTING THE WRIT

ATTORNEY-CLIENT PRIVILEGE — FUNDAMENTAL UNFAIRNESS

The District Court's ruling allowed a claim of attorney-client privilege to subvert the fundamental fact finding process upon matters the holder of the privilege had himself placed in issue. In sanctioning this holding, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Carver's waiver of a claim to an attorney-client privilege is just as clear as the similar waiver of Fifth Amendment self-incrimination privileges and First Amendment privacy and associational privileges, which were waived by bringing suit in *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981), *cert. granted with instructions to dismiss the complaint sub nom. Moore v. Black Panther Party*, 102 S.Ct. 3505 (1982). One of the District Court's opinions in *Black Panther Party*, 483 F.Supp. 251 (D.D.C. 1980), which this Court effectively reinstated on July 2, 1982, applied the same waiver prin-

ciple which the courts below failed to apply in this case. ("The plaintiffs cannot choose to be litigants and at the same time exempt themselves from the rule of law that binds all federal litigants. They cannot, that is, assert the privilege and at the same time proceed with this lawsuit.") 483 F.Supp. at 253.[12]

By allowing Carver to suppress the facts directly relevant to Carver's own assertion that he relied upon Sedco, rather than upon the continuing advice of his own lawyers, the trial failed in its function as a vehicle for ascertainment of the truth. Instead, the trial accomplished little more than adjudication of a hypothetical fact situation imposed by Carver's selective disclosure and suppression of information.[13]

Recognition of Carver's waiver of his right to claim an attorney-client privilege does no violence to the policy behind the attorney-client privilege. Upon remand for further proceedings, Carver's executors will still retain the power to elect whether or not to waive the privilege. If

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[12]The overwhelming weight of authority recognizes that a conditional privilege is waived when a litigant, for his own advantage, chooses to place in issue information otherwise protected by the privilege. E.g., United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc), cert. denied, 403 U.S. 993 (1971) (attorney-client privilege); Russell v. Curtin Matheson Scientific, Inc., 493 F.Supp. 456 (S.D. Tex. 1980) (attorney-client privilege); Hearn v. Rhay, 68 F.R.D. 574, 582 (E.D. Wash. 1975) (attorney-client privilege); Independent Productions Corp. v. Loew's, Inc., 22 F.R.D. 226 (S.D.N.Y. 1958) (First Amendment privilege); State of Iowa v. Cole, 295 N.W.2d 29, 35 (Iowa 1980) (insanity plea waives physician-patient privilege by putting mental condition in issue). Cf. Herbert v. Lando, 441 U.S. 153, 165 (1979) (libel suit — "Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages.")

[13]This language is a paraphrase of the language of the Fifth Circuit reversing after a party wrongfully withheld discoverable matter. Rozier v. Ford Motor Co., 573 F.2d 1332, 1346 (5th Cir. 1978).

they choose to do so, the issues can be tried fairly. If they choose not to do so, Carver's counterclaim should be dismissed. This is the sensible holding in the cases which have addressed the issue:

1. *Black Panther Party v. Levi*, 483 F.Supp. at 253 ("The plaintiffs cannot choose to be litigants and at the same time exempt themselves from the rule of law that binds all federal litigants. They cannot, that is, assert the privilege and at the same time proceed with this lawsuit.")

2. *Anderson v. Nixon*, 444 F.Supp. 1195, 1201 (D.D.C. 1978) ("The Court will not force disclosure of sources. The choice is plaintiffs. If he declines to answer, the Court will entertain a motion under Rule 37(b) for default.")

3. *McCullough Tool Co. v. Pan Geo Atlas Corp.*, 40 F.R.D. 490, 494 (S.D. Tex. 1966) ("A plaintiff cannot be reluctant. If plaintiff wishes to prosecute this action before this court, it must be prepared fully to disclose its role in the matters which it has brought before this court.")

4. *Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958) ("Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this asserted privilege as both a sword and a shield. Defendants ought not be denied a possible defense because plaintiffs seek to invoke an alleged privilege.")

In the cases cited above, the claimants were stopped at the threshold if they elected not to respond to discovery. In the case at bar, the trial court departed from this rule by denying discovery. This unfairness was then com-

pounded when, during the trial, the trial court also denied the right of cross-examination upon the issue.

The right of cross-examination goes to the very foundation of the adversary system.

> We realize that the right of cross-examination inheres in every adversary proceeding in that it is established beyond any necessity for citation of authorities . . . that if cross-examination of an available witness is not had the litigant, deprived of cross-examination, has been denied due process of law.

Derewecki v. Pennsylvania R. Co., 353 F.2d 436, 442 (3d Cir. 1965).

Only through cross-examination can a party effectively probe and test an opponent's claims. "In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support a finding...." *Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93 (1913).

Fundamental principles of due process require cross-examination when important rights are at stake. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Denial of the right of cross-examination on a central issue cannot be justified upon grounds of supposed discretion. Nothing in Fed.R.Evid. 611, *see* Appendix F-2, creates discretion to suspend the right of cross-examination upon a central issue; especially when the secrecy inherent in Carver's claim of attorney-client privilege prevents access to alternative sources of proof. "The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-

examination. This was an abuse of discretion and prejudicial error." *Alford v. United States*, 282 U.S. 687, 694 (1931).

Fundamental deprivation of the right of cross-examination cannot be condoned upon concepts of harmless error.[14] "To say that prejudice can be established only by showing that cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards to a fair trial." *Alford v. United States*, 282 U.S. at 692.

The attorney-client privilege, when properly applied, serves a legitimate function in the working of the adversary system. When the privilege is abused, it improperly interferes with the fundamental ascertainment of the truth. Used to prevent cross-examination upon issues the claimant himself has raised, it affects the basic integrity of the adversary system. Denial of cross-examination on this ground offends basic due process and fair trial principles.

The bar is anxious for authoritative decision from this Court as to the workings of the privilege.[15] This case squarely presents an egregious abuse of the privilege affecting fundamental rights. It raises an issue of perva-

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[14] *A fortiori*, in this non-jury case, requiring the district court to hear and consider critical evidence is a far more important policy than the expediencies underlying the concept of harmless error.

> The major policy underlying the harmless error rule is to preserve judgments and avoid waste of time. Discarding a jury verdict is extremely wasteful. Requiring a district judge to examine more evidence and re-evaluate his decisions is not nearly so prodigal.

Gulf States Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 519-520 (5th Cir. 1981).

[15] E.g., the decision in Upjohn Co. v. United States, 449 U.S. 383 (1981), was eagerly awaited.

sive importance to basic trial practice which should be, but has not yet been, decided by this Court.

BRIBERY

Carver's bribe was major. It was $1,500,000. The bribe presents a serious violation of national public policy of both the United States and Qatar.[16] The District Court recognized that "'[c]orporate bribery is bad business.... Thus foreign corporate bribery affects the very stability of overseas business.... "[P]laying bribes — apart from being morally repugnant and illegal in most foreign countries is simply not necessary for the successful conduct of business here or overseas."'" (Appendix B-124-25)

This longstanding public policy[17] is now also codified in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2. (Appendix F-4) The District Court recognized that this important policy unquestionably existed at the time of the events in this suit. "Moreover, whether or not the payment violated any laws of the United States in effect at the time, it was certainly in violation of the public policy of this nation. The purpose of the Foreign Corrupt

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[16]Translation of Article 109 of the Qatar Penal Law relating to bribery of public employees is set out in footnote 76 of the District Court opinion, Appendix B-123.

[17]Even before the enactment of sections 103 and 104 of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 and 78dd-2, the SEC had taken steps to discover and eliminate the undercover use of corporate funds to secure foreign business or business concessions. *See* Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong. 2d Sess. (1976) (SEC Rep.); *see also*, S.Rep.No. 114, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 4098, 4099.

Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 118 (2d Cir. 1982).

Practices Act was precisely to put added teeth into that policy." (Appendix B-123)[18]

At least two important public policies make it wrong for Carver to be permitted to invoke the jurisdiction of the federal courts of this nation to recover money he spent to further the operation of his illegally obtained enterprise:

(1) The traditional rule that courts will not permit themselves to be used to adjust rights flowing from an immoral or illegal act. *E.g.*, "Courts will not aid those whose cause of action is based upon an illegal act." *United States v. Farrell*, 606 F.2d 1341, 1349 (D.C. Cir. 1979);

(2) Deterrence of corrupt conduct which: (a) affects the relationship of this nation with foreign governments; and (b) affects the stability of our international trade.

Those tempted to commit and profit from corrupt acts which interfere with the integrity of foreign or domestic governments should be firmly discouraged from resorting to our federal court system to recoup their ensuing losses.[19] It is perverse logic to provide the aid of a court system — itself firmly founded upon principles of integrity — to aid those whose losses flow from their inducement of a government to act corruptly. However, the clear

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[18]The issue is national public policy, not the effective date of any particular statute. Furthermore, the Foreign Corrupt Practices Act of 1977 was effective before Carver invoked the jurisdiction of the District Court in December 1978.

[19]In contexts less serious than inducing governmental corruption on an international scale, seriousness of the offense prevents the wrongdoer access to the courts. Seriousness of the offense overcomes the wrongdoer's rejoinder that his claim is "collateral" to his offense. Nathan v. Tenna Corp., 560 F.2d 761, 764-65 (7th Cir. 1977).

message from the courts below is one of charitably condoning a suit for the full measure of the losses directly resulting from such conduct, reduced only by the actual bribe money itself. Carver, for himself and those tempted to follow his example, has successfully set precedent that our federal court system will knowingly allow itself to be used to recoup losses which were directly incurred to further his illegally obtained enterprise.

This Court has not yet decided this issue of serious national importance: Whether our federal court system will knowingly allow itself to be used by a litigant to recoup losses the litigant directly incurred to further operations of a business enterprise he acquired through bribery which corruptly influenced a foreign governmental official.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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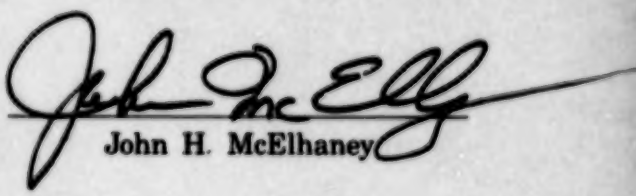
October 5, 1982

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing petition for writ of certiorari and the appendix have been mailed to Mr. David M. Elderkin, of Elderkin, Pirnie, VonLackum & Elderkin, 619 Higley Building, P. O. Box 1968, Cedar Rapids, Iowa 52406, and to Mr. D. G. Ribble, of Lynch, Dallas, Smith & Harman, 526 Second Avenue, S.E., P. O. Box 2457, Cedar Rapids, Iowa 52406 this 5th day of October, 1982.



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